TANG KAM THAI & ORS

v.

LANGKAH CERGAS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S1-22-1351-2002]
29 APRIL 2005

CIVIL PROCEDURE: *Interim payment - Application for - Breach of sale and purchase agreement - Delay in delivering vacant possession - Whether liquidated damages to be paid - Rules of the High Court 1980, O. 22A r. 3(1)(a),(e)*

This was the plaintiffs' application under O. 22A r. 3(1)(a) and (e) of the Rules of the High Court 1980 to order the first defendant to pay an interim payment of RM2,003,425 to the plaintiffs. The first defendant, a property developer, entered into a written sale and purchase agreement with the 9th, 10th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th and 120th plaintiffs (hereinafter referred to as 'Commercial Properties Purchasers') who purchased commercial properties developed by the first defendant. All the other plaintiffs are purchasers of residential properties in a project developed by the first defendant (hereinafter referred to as 'Residential Properties Purchasers'). Under the terms and conditions in the sale and purchase agreements, the first defendant was to deliver vacant possession of the properties so purchased by the plaintiffs within a certain specified period leading to the issuance of certificate of fitness (CF) to occupy the said properties, which till date has not been issued by the authorities. The plaintiffs in this suit claimed that the first defendant has breached this term and demanded from the first defendant liquidated damages.

Held:

[1] Though admitting to such delay, the first defendant blamed it on circumstances beyond its control such as economic slowdown but these circumstances do not exempt the first defendant from fulfilling its obligation to pay the Residential Properties Purchasers the agreed liquidated damages as set out in the Residential Properties Purchasers' agreements. The terms therein are explicit. When there is a delay in delivering vacant possession then liquidated damages have to be paid by the first defendant calculated after 36 months from date of agreements to the time when vacant possession is delivered. (p 90 h)

[2] On the excuse that the first defendant had written to the Housing Ministry for extension of time to deliver vacant possession, the court could not accept this as an excuse since exemption is only effective when approval is granted; not upon application. Until the said Ministry gives such extension, the time for completion remains as stated in the agreements. (p 91 a)

[3] On the excuse that the planning authorities have imposed new demands on the first defendant to comply before CF could be entertained, this was a matter for the first defendant, as a developer of the said properties, to deal with. This responsibility could not be passed onto the purchasers as an excuse for the payment of liquidated damages. (p 91 b)

[4] Towards the Residential Properties Purchasers' claim for delay in delivering vacant possession of the common facilities the first defendant asserted that this was completed on time. Various documents showing payments to contractors for jobs conducted in this area as well as architect's certification for such works were tendered to support this contention. The court was of the view that the plaintiffs had not proved to the satisfaction of this court more than a *prima facie* case on this claim against the first defendant at this stage of the proceedings. Thus they are not justified in receiving any interim payment from the first defendant for this item claimed. (p 91 c-d)

[5] As for the Commercial Properties Purchasers the principal defence of the first defendant was the absence of proof that the first defendant has willfully delayed the completion of the said property. However, the first defendant's excuses were without legal justification. Poor management by the previous directors of the first defendant is itself a factor for willful delay. The Commercial Properties Purchasers expected the first defendant to manage its affairs properly and professionally so that projects undertaken by them should be completed on time in accordance with the terms of the agreements. Failure to do so is in itself proof of willful delay. Same goes for the excuse of economic slowdown affecting the completion of the properties. With adequate and proper planning and forecast, coupled with appropriate actions and remedies, the first defendant ought to have anticipated this and taken appropriate steps to overcome this problem. Failure to overcome this was another factor that constituted willful delay. (p 91 e-h)

[6] The amount of liquidated damages claimed by the plaintiffs for interim payment was calculated up to 20 November 2002. Except for the amount that the court refused to allow for delay in delivering vacant possession of the common facilities and those plaintiffs that have filed notices of discontinuance, the plaintiffs' claim was allowed with cost in the cause. (p 92 d-f)

[Order accordingly. The amount of interim payment to be paid by the first defendant to the plaintiffs respectively in the proportion as disclosed in the particulars for delay in delivery of vacant possession of the properties is RM1,652,375.]

Case(s) referred to:
Mediahouse Sdn Bhd v. Koh Kim Suan [1998] 3 AMR 2338
Shearson Lehman Bros Inc v. Maclaine Watson & Co Ltd [1987] 2 All ER 181

Legislation referred to:
Rules of the High Court 1980, O. 22A r. 3(1)(a), (e), (2)(c)

For the plaintiffs - Harwinder Kaur; M/s AJ Ariffin, Yeo & Harpal
For the 1st, 4th & 5th defendants - SP Chanravathane; M/s Manjeet Kaur & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

James Foong J:

Introduction

Enclosure 13 is an application of the plaintiffs under O. 22A r. 3(1)(a) and (e) of the Rules of High Court to order the 1st defendant to pay an interim payment of RM2,003,425 to the plaintiffs.

Plaintiffs' Claim

The 1st defendant is a property developer.

Save and except the 9th. 10th. 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th and 120th plaintiffs, all the other plaintiffs are purchasers of residential properties in a project developed by the 1st defendant. For ease of reference I shall be referring them as 'Residential Properties Purchasers'.

The 9th, 10th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th, and 120th plaintiffs are purchasers of commercial properties that are also developed by the 1st defendant. For these plaintiffs, I shall hereinafter be referring them as 'Commercial Properties Purchasers'.

The purchases by the plaintiffs are all evidenced by written sale and purchase agreements entered into between the plaintiffs and the 1st defendant.

Under the terms and conditions in the sale and purchase agreements the 1st defendant is to deliver vacant possession of the properties so purchased by the plaintiffs within a certain specified period leading to the issuance of certificate of fitness (CF) to occupy the said properties, which till date has not been issued by the authorities. The plaintiffs in this suit claim that the 1st defendant has breached this term and they are now demanding from the 1st defendant liquidated damages.

In respect of the sale and purchase agreements involving the Residential Properties Purchasers cl. 22 requires the 1st defendant to complete the residential properties and deliver vacant possession of the same, with water and electricity supply within 36 calendar months from date of the agreements. Then cl. 23 specifies that delivery of vacant possession means: upon issuance of the 1st defendant's architect certificate certifying that the said property has been duly completed; water and electricity have been connected thereto and; the 1st defendant has applied for CF from the appropriate authorities; provided always that the Residential Properties Purchasers have paid all monies due under the purchase price. And in the event that the 1st defendant fails to deliver vacant possession within the time as stated then the Residential Properties Purchasers are entitled to be paid 10% per annum of the purchase price for each day of delay as agreed liquidated damages.

In addition to the above, cl. 24 of the agreements demands the 1st defendant to complete the common facilities of the residential properties within 36 months from date of the agreements. In the event of default, the 1st defendant shall pay on a day-to-day basis 10% per annum of the last 20% of the purchase price.

For the Commercial Properties Purchasers, cl. 11.1 of their agreements with the 1st defendant states that the 1st defendant shall practically complete the said commercial properties within 36 months from date of agreements provided "the architect's certificate certifying the same shall be conclusive evidence of practical completion of the premises." Then if the 1st defendant "willfully delay practical completion of the premises beyond the aforesaid period the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight percent (8%) per annum" from the date of expiry of the 36 months to date of issuance of the certificate of practical completion by the 1st defendant's architect.

For particulars of liquidated damages, the plaintiffs have set out in detail various tables to show the period of delay and the amount due. For the Residential Properties Purchasers there are two tables: one is for liquidated damages for late delivery of the residential properties and the other is for liquidated damages for failure to complete the common facilities. Calculation on the amount stated in the particulars is up to 20 November 2002.

It is on these amounts stated in the particulars that the plaintiffs are now claiming interim payment from the 1st defendant.

Defence

The 1st defendant has raised various defences in its affidavit in reply. I shall deal with them in the course of my deliberation.

The Law

The law on interim payment is well set out in O. 22A RHC and elaborated in the judgment of Faiza Tamby Chik J in *Mediahouse Sdn Bhd v. Koh Kim Suan* [1998] 3 AMR 2338. To succeed in this application the court must be satisfied that:

(a) the 1st defendant has admitted liability for the plaintiffs' damages;

(b) or that if the action proceeded to trial the plaintiff would obtain judgment for substantial damages against this defendant.

On the burden of proof, it is accepted that "something more than a *prima facie* case is clearly required, but not proved beyond reasonable doubt" (*Shearson Lehman Bros Inc v. Maclaine Watson & Co Ltd* [1987] 2 All ER 181 @ 187).

Analysis

The plaintiffs' claim that the 1st defendant in its defence has admitted to delay in handing over vacant possession of the properties to the plaintiffs. I agree with them after perusing the defence of the 1st defendant. Admission is found in paras. 13, 14 and 15 of the defence where the defendant explained that this was an abandoned project and, in para. 16 the 1st defendant expressly states that the delay in reviving the project has taken 24 months. Then in para. 17, the 1st defendant accused the Residential Properties Purchasers of having bought these properties at a low price when the cost of construction is much higher. Further admission is found in para. 42 of the defence. Though admitting to such delay, the 1st defendant blamed it on circumstances beyond its control *inter alia*; the management of the 1st defendant was under different people prior to their taking over; economic slow down; and changes made by the planning authorities; and that written requests for extension of time for delivery of vacant possession has been made to the Housing Ministry. But all these, in my opinion, do not exempt the 1st defendant from fulfilling its obligation to pay the Residential Properties Purchasers the agreed liquidated damages as set out in the Residential Properties Purchasers' agreements. The terms therein are explicit. When there is a delay in delivering vacant possession then liquidated damages have to be paid by the 1st defendant calculated after 36 months from date of agreements to the time when vacant possession is delivered.

On the excuse that the 1st defendant has written to the Housing Ministry for extension of time to deliver vacant possession I cannot accept this as an excuse since exemption is only effective when approval is granted; not upon application. Until the said Ministry gives such extension, the time for completion remains as stated in the agreements.

On the excuse that the planning authorities have imposed new demands on the 1st defendant to comply before CF could be entertained, I find this is a matter for the 1st defendant, as a developer of the said properties, to deal with. This responsibility cannot be passed onto the purchasers as an excuse for the payment of liquidated damages.

Towards the Residential Properties Purchaser's claim for delay in delivering vacant possession of the common facilities the 1st defendant asserts that this was completed on time. Various documents showing payments to contractor for jobs conducted in this area as well as architect's certification for such works were tendered to support this contention. Having perused these, I am of the view that the plaintiffs has not proved to the satisfaction of this court more than a *prima facie* case on this claim against the first defendant, at this stage of the proceedings. Thus they are not justified in receiving any interim payment from the 1st defendant for this item claimed.

As for the commercial properties purchasers the principal defence of the 1st defendant is the absence of proof that the 1st defendant has willfully delayed the completion of the said property. But based on the same reasons offered by the 1st defendant for the delay in delivering vacant possession to the Residential Properties Purchasers, I find the 1st defendant's excuses without legal justification. In fact, poor management by the previous directors of the 1st defendant is itself a factor for willful delay. The Commercial Properties Purchasers expected the 1st defendant to manage its affairs properly and professionally so that projects undertaken by them should be completed on time in accordance with the terms of the agreements. Failure to do so is, in itself, proof of willful delay. Same goes for the excuse of economic slow down affecting the completion of the properties. With adequate and proper planning and forecast, coupled with appropriate and actions and remedies, the 1st defendant ought to have anticipated this and taken appropriate steps to overcome this problem. Failure to overcome this is, in my view, another factor constituting willful delay.

The 1st defendant has raised the issue on the identity, legal status and eligibility of a number of plaintiffs to bring this action. But in para. 1 of the defence, the 1st defendant has admitted that the plaintiffs so named in this action are purchasers of the properties as set out in the statement of claim. With such admission, the 1st defendant cannot challenge the status of these plaintiffs.

The 1st defendant has raised an objection on the validity of the affidavit affirmed by the 1st plaintiff for and on behalf of all the other plaintiffs claiming that she has no personal knowledge of facts asserted therein. This claim, I find lacks merits. The first plaintiff has stated that she is speaking for and on behalf of all other plaintiffs and is authorised by them to do so. Then she proceeded to state categorically that her disposition is based on facts within the best of her personal knowledge and from documents she has access to. This, I find is sufficient to entitle her to make the averments in her affidavits.

The 1st defendant has claimed that if interim payment is made against them, they do not have the means to satisfy such payment and under O. 22A r. 3(2)(c) RHC, the court must take this factor into consideration. I find that this provision under O. 22A r. 3(2)(c) RHC only applies to "personal injuries" claims. It has no application here.

Conclusion

The amount of liquidated damages claimed by the plaintiffs for interim payment is calculated up to 20 November 2002. This amount is less than the total sum claimed by the plaintiffs in the statement of claim. Except for the amount that I refused to allow for delay in delivering vacant possession of the common facilities and those plaintiffs that have filed notices of discontinuance, I allow this plaintiffs' claim in encl. 13 with cost in the cause. The amount of interim payment to be paid by the 1st defendant to the plaintiffs respectively in the proportion as disclosed in the particulars for delay in delivery of vacant possession of the properties is RM1,652,375